(4)

Supreme Court, U.S.
FILED
NOV 13 2003
OFFICE OF THE CLERK

No. 03-359

In the Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

R. ALEXANDER ACOSTA
Assistant Attorney General

MARK L. GROSS
SARAH E. HARRINGTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

26 pp

QUESTION PRESENTED

Section 8014(3) of the Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1234 (1999), permitted the Air Force to contract out work previously performed by more than ten federal civilian employees only after completing a "most efficient and cost-effective organization" analysis and certifying that analysis to Congress. That provision, however, allowed the Air Force to forgo such analysis where the Air Force converted an activity or function to performance by, *inter alia*, a qualified firm owned by federally recognized Indian tribes.

The question presented is whether Section 8014(3) violated petitioners' rights under the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Peña*, 515 U.S. 200 (1995)	7, 19
Adarand Constructors, Inc. v. *Mineta*, 534 U.S. 103 (2001)	15, 16
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	14
California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)	20
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)	11
Morton v. *Mancari*, 417 U.S. 535 (1974)	7, 10, 11, 12
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999)	15
Rice v. *Cayetano*, 528 U.S. 495 (2000)	8, 19, 20
United States v. *Antelope*, 430 U.S. 641 (1977)	7, 11
United States v. *Cohen*, 733 F.2d 128 (D.C. Cir. 1984)	11
United States v. *Raines*, 362 U.S. 17 (1960)	5, 14
United States v. *Sandoval*, 231 U.S. 28 (1913)	7
United States v. *Wheeler*, 435 U.S. 313 (1978)	11
Washington v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979)	8, 11
Washington v. *Davis*, 426 U.S. 229 (1976)	7
Williams v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997), cert denied, 523 U.S. 1117 (1998)	20

Constitution and statutes: Page

U.S. Const.:
Art. I, § 8, Cl. 3 (Indian Commerce Clause) 7, 12, 19
Amend. V (Due Process Clause) 4
Amend. XV 19
Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (43 U.S.C. 1601 *et seq.*) 3
Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1212:
§ 8014, 113 Stat. 1234 ..... 2, 9
§ 8014(3), 113 Stat. 1234 ..... *passim*
Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, § 8014, 114 Stat. 677 ..... 2, 17
15 U.S.C. 647(a)(15) 17
25 U.S.C. 450b(e) 3, 16, 17

Miscellaneous

146 Cong. Rec.:
p. S4961 (daily ed. June 12, 2000) 17
p. S5019 (daily ed. June 13, 2000) 17, 18

In the Supreme Court of the United States

No. 03-359

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 330 F.3d 513. The opinion of the district court (Pet. App. 15a-49a) is reported at 195 F. Supp. 2d 4.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2003. The petition for a writ of certiorari was filed on September 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from the United States Air Force's award of a civil engineering contract to an entity owned by federally recognized Indian tribal entities.

1. Section 8014 of the Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1234 (1999), prohibited the Department of Defense from using appropriated funds to pay private contractors for work previously performed by more than ten civilian government employees unless the Department first performed a "most efficient and cost-effective organization" (MEO) analysis and certified that analysis to Congress. Pet. App. 2a. Section 8014(3), however, contained an exception. Under that exception, the Department could forgo MEO analysis when converting certain commercial or industrial functions to performance by, *inter alia*, a qualified firm under "Native American ownership." *Ibid.*[1] In later appropriations acts, Section 8014(3) has been modified to specify that the firm must be owned by a federally recognized "Indian tribe." See, *e.g.*, Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, § 8014, 114 Stat. 677 (2000); see also Pet. App. 3a.

In December of 1998, the Air Force announced that it would initiate a study of the 377th Civil Engineer Group (CEG) at Kirtland Air Force Base in Albequerque, New Mexico, to determine whether it would be efficient and cost-effective to hire a private company to perform the civil engineering functions then being

---

[1] Section 8014 also allowed the Department of Defense to forgo MEO analysis when an activity is converted to performance by a qualified nonprofit agency for the blind, or by a qualified nonprofit agency for "other severely handicapped individuals." 113 Stat. 1234.

performed by United States Air Force employees. Before the competitive bidding process was fully under way, however, the Air Force declared its intention, pursuant to Section 8014(3), to utilize the "direct conversion" study process permitted by Section 8014(3) for firms owned by Native Americans. The Air Force solicited capability statements from three such firms. Officials at Kirtland Air Force Base determined that cost savings could be achieved by converting civil engineering functions at the Base from in-house performance to performance by Chugach Management Services, JVC (Chugach), a joint venture owned by the Chugach Alaska Corporation and Afognak Village Corporation, which are Alaska Native Corporations formed pursuant to the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971), codified as amended at 43 U.S.C. 1601 *et seq.*[2] The Air Force awarded the contract to Chugach in 2000 and consequently eliminated a number of positions at the Kirtland Air Force Base. Pet. App. 2a, 17a.

2. Petitioners Rose Reed and Inez Marquez were civilian Air Force employees assigned to the 377th CEG at Kirtland Air Force Base. After the Air Force awarded the contract to Chugach, Marquez retired from Air Force employment and was hired by Chugach

---

[2] Chugach is a joint venture between Chugach Management Services, Inc., and Alutiiq Management Services, LLC. Chugach Management Services, Inc., is a wholly owned subsidiary of the Chugach Alaska Corporation. Alutiiq Management Services, LLC, is a wholly owned subsidiary of Afognak Village Corporation. Congress specifically included Alaska Native Villages within the definition of "Indian tribe" in 25 U.S.C. 450b(e), which it has made applicable in this setting. See Pet. App. 2a, 16a; pp. 16-17 & note 6, *infra*. Petitioners have never disputed that Chugach qualifies as a firm owned by tribal entities for present purposes.

to work on the contract. Petitioner Reed relocated to a federal job elsewhere in the country. Together with petitioner American Federation of Government Employees, Local 2263—a labor organization whose members occupied positions affected by the award to Chugach—they filed this suit against the United States and James G. Roche, in his official capacity as Secretary of the Air Force. Pet. App. 17a.

The complaint asserted only a facial challenge to a portion of Section 8014(3) as it appeared in the Department of Defense's fiscal year 2000 appropriation act. The complaint alleged that Section 8014(3), by permitting the Air Force to forgo a "most efficient and cost-effective organization" analysis when converting an activity to performance by a qualified firm under "Native American" ownership, violated the equal protection component of the Due Process Clause of the Fifth Amendment. Pet. App. 3a, 16a-17a. According to the complaint, the classification "Native American" is racial and its use is therefore subject to strict scrutiny. *Id.* at 4a. Chugach intervened in the lawsuit and, on June 30, 2000, the district court denied petitioners' motion for a preliminary injunction. 104 F. Supp. 2d 58.[3]

On cross-motions for summary judgment, the district court entered judgment in favor of respondents. Pet. App. 15a-49a. The district court concluded that Section 8014(3) is subject to rational basis review because it does not discriminate on the basis of race or another suspect or quasi-suspect category. See *id.* at 38a.

---

[3] Asserting a property interest in federal employment, petitioners also argued that Section 8014(3) violates substantive due process. The district court, Pet. App. 47a-49a, and the court of appeals, *id.* at 14a, both rejected that argument, and petitioners do not re-assert it here.

Instead, Section 8014(3) draws a political distinction. *Ibid.* The Indian tribes, the court explained, are separate quasi-sovereigns to which the United States owes a unique trust responsibility. *Id.* at 39a-40a. The court concluded that Section 8014(3) was a reasonable means by which Congress may fulfill its special obligations to the Indian tribes, including Alaska Native Corporations. *Id.* at 40a-47a; see p. 3, note 2, *supra.*

3. The court of appeals affirmed. Pet. App. 1a-14a. Addressing the scope of the issues before it, the court first held that petitioners' request for an injunction against the contract award under the Department of Defense Appropriations Act for fiscal year 2000 was moot, that fiscal year having long since passed. *Id.* at 5a. In addition, the court held that claimants lacked standing to challenge any contracting decisions under Section 8014(3) other than the one at Kirtland Air Force Base, since petitioners had identified no past or imminent future risk of harm to themselves from such other contracting decisions. *Ibid.*

The court also declined to address petitioners' claim that Section 8014(3) is unconstitutional because, under it, the Air Force allegedly could have accorded preferences "not only for Indian tribes but also for firms owned by Native Americans who were not tribal members." Pet. App. 5a. "[O]ne to whom application of a statute is constitutional," the court observed, "will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Id.* at 5a-6a (quoting *United States* v. *Raines*, 362 U.S. 17, 21 (1960)). Here, the contract was awarded to a firm owned by federally recognized Indian tribes, not by individual non-tribal Native Americans. In addition, so far as the litigants or

the court was aware, Section 8014(3) had been invoked only once before, also to award a contract to an entity owned by a federally recognized Indian tribe. Finally, the version of Section 8014(3) enacted in more recent Appropriations Acts largely limited itself to entities owned by federally recognized Indian tribes. *Id.* at 3a; see p. 18 & note 7, *infra*. Thus, although petitioners' constitutional challenge was premised on the assertion that Section 8014(3) provided a racial preference for firms owned by individual non-tribal Indians as determined by race, petitioners failed to show that such a preference had ever been or would ever be granted. Pet. App. 5a. The court accordingly held that the "only question properly before" it was "whether the government violated the equal protection component of the Due Process Clause when it invoked § 8014(3) to grant a contract to a firm wholly owned by *Indian tribes*." *Id.* at 6a-7a (emphasis added).

So limiting the scope of the question under review, the court also explained, is consistent with the need to avoid "advisory" opinions about "hypothetical applications of § 8014(3)" that were not likely to arise. Pet. App. 7a-8a. The court thus saw no reason to address the government's argument that Section 8014(3)'s reference to firms with "Native American ownership" should be construed as including only firms owned by "members" of federally recognized Indian tribes or by the Tribes themselves. *Id.* at 8a; see *id.* at 4a. Because no preferences had been granted to firms owned by individual Indians (tribal or non-tribal), that issue was not before the court. Instead, "the only issue" was "the validity of a preference for Indian tribes" themselves. *Id.* at 8a.

Turning to that issue, the court of appeals held that preferences for federally recognized Indian tribes are

"normally" subject only to rational basis review. Pet. App. 6a, 8a-9a.[4] The court explained that Congress has exclusive and plenary authority "to determine which 'distinctly Indian communities' should be recognized as Indian tribes," *id.* at 8a-9a (quoting *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913)), and to "legislate on behalf of federally recognized Indian tribes" under treaties and authority "drawn both explicitly and implicitly from the Constitution itself," *id.* at 9a (quoting *Morton* v. *Mancari*, 417 U.S. 535 (1974)). The court of appeals observed that, in light of that authority and Congress's exclusive power under the Indian Commerce Clause to "regulate Commerce * * * with the Indian Tribes," U.S. Const. Art. I, § 8, Cl. 3, this Court has repeatedly sustained legislation that treats Indian tribes differently from other persons and entities. Pet. App. 8a-9a. This "Court's decisions," the court of appeals explained, "leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications." *Id.* at 9a (quoting *United States* v. *Antelope*, 430 U.S. 641, 645 (1977)); see *id.* at 9a-10a (canvassing this Court's decisions upholding preferences for Indian tribes).

The court of appeals rejected petitioners' argument that the classification at issue here is "racial" rather than "political" and therefore subject to strict scrutiny under *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995). The court observed that, notwithstanding

---

[4] The court used the qualifier "normally" to except those cases in which Congress, in enacting what facially appears to be a preference for Indian tribes, has an illegitimate discriminatory purpose. Pet. App. 6a (citing *Washington* v. *Davis*, 426 U.S. 229 (1976)).

the strict scrutiny applicable to racial classifications, this Court has held that "the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." Pet. App. 10a (quoting *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979) (internal quotation marks omitted)).

The court of appeals agreed that there might be more "difficult" cases given *dictum* in this Court's decision in *Mancari*, as well as the observation in *Rice* v. *Cayetano*, 528 U.S. 495, 519-520 (2000), that the preference in *Mancari* was limited to employment in the Indian service. But the court of appeals concluded that this case is not a "difficult" one:

> The critical consideration is Congress' power to regulate commerce "with the Indian Tribes." While Congress may use this power to regulate tribal members, * * * regulation of commerce with [the] tribes [themselves] is at the heart of the Clause, particularly when the tribal commerce is with the federal government, as it is here. * * * When Congress exercises this constitutional power it necessarily must engage in classifications that deal with Indian tribes. Justice Scalia, when he was on our court, put the matter this way: "in a sense the Constitution itself establishes the rationality of the . . . classification, by providing a separate federal power that reaches only the present group." *United States* v. *Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (en banc).

Pet. App. 11a. The court of appeals accordingly concluded that, when Congress enacts legislation that di-

rectly regulates federal commerce with federally recognized Indian tribes, distinctions between the Tribes and non-tribal entities are subject only to rational basis review. *Id.* at 11a-12a.

Section 8014(3), the court of appeals concluded, survives rational basis review because it promotes "tribal economic development." Pet. App. 12a. The court rejected petitioners' contention that Congress was required to specify its purpose or reasons for the preference in legislative history. *Ibid.* So long as there are plausible reasons for Congress's action, the court held, the legislation must be upheld. Here, "the economic development of federally recognized Indian tribes * * * is rationally related to a legitimate legislative purpose and thus constitutional." *Id.* at 13a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Nor does the decision raise an issue of importance warranting this Court's review. To the contrary, while petitioners purport to challenge as unconstitutional a putative application of Section 8014(3) of the Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1234 (1999)—the granting of preferences for entities owned by individual Native Americans as determined by race—the court of appeals declined to address that application because it was wholly hypothetical. Section 8014(3) had never in the past been applied to grant preferences in that fashion; it has been applied only to benefit entities owned by *Indian tribes*, *i.e.*, by quasi-sovereign domestic nations based on their unique constitutional, historical, and political status—an application petitioners do not appear to question. Congress, moreover,

has amended Section 8014(3) to clarify that the preferences at issue may not be granted in the fashion petitioners challenge as unconstitutional.

1. Petitioners do not dispute that Congress may distinguish between the federal government's commerce with Indian tribes on the one hand and its economic interactions with non-tribal entities or persons on the other. See Pet. 7 ("some political preferences for Native American tribes may be permissible"). Indeed, petitioners concede that this Court has repeatedly upheld separate and often preferential treatment of Indian tribes. See *ibid.* (citing *Morton* v. *Mancari*, 417 U.S. 535, 553-554 (1974)). Unlike other individuals or entities, Indian tribes—political units—have a "unique legal status" under the Constitution as domestic sovereign nations. *Mancari*, 417 U.S. at 551. Consequently, where Congress singles out interactions with the Tribes for differential regulation, the distinction is political rather than racial and must be upheld so long as it is rationally designed to further Indian self-goverance. See *id.* at 552-555; Pet. 7-8. This is true even when Congress provides benefits to members of federally recognized Indian tribes, rather than the Tribes themselves. As the Court explained in *Mancari*, preferential treatment for federally recognized Indian tribes "does not constitute 'racial discrimination'" and "is not even a 'racial' preference" because "[t]he preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes" and "operates to exclude many individuals who are racially to be classified as 'Indians.'" 417 U.S. at 553-554 & n.24. Preferences that run in favor of the Tribes themselves are *a fortiori* "political rather than racial in nature." *Id.* at 553, 554 n.24.

Congress's unique authority to legislate on behalf of the Tribes as politically defined groups "with their own political institutions" is "expressly provided for in the Constitution." *United States* v. *Antelope*, 430 U.S. 641, 645-646 (1977); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979); *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978); *United States* v. *Cohen*, 733 F.2d 128 (D.C. Cir. 1984) (en banc) (Scalia, J.). Federal laws that single out the Tribes themselves thus are part and parcel of the governance of "once-sovereign political communities" and are "not to be viewed as legislation of a 'racial group' consisting of 'Indians.'" *Antelope*, 430 U.S. at 646 (quoting *Mancari*, 417 U.S. at 533 n.24). Indeed, the "decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *Id.* at 645-646; see *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976) (tribal classifications "neither 'invidious' nor 'racial' in character"). Consequently, as "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," reasonably promoting tribal self-governance through (for example) economic development, "such legislative judgments will not be disturbed." *Mancari*, 417 U.S. at 555; see *Yakima Indian Nation*, 439 U.S. at 500-501 (holding that Congress may legislatively single out Indian tribes subject to rational basis review).

Under those principles, the court of appeals' decision to uphold Section 8014(3) on "the facts of this case," Pet. App. 6a, is unquestionably correct. In this case—and in the only other known application of Section 8014(3)—Section 8014(3) was employed to grant a contract not to an entity owned by individual Native Americans (or

even members of an Indian Tribe), but rather "to a firm wholly owned by *Indian tribes*" themselves. *Id.* at 6a-7a (emphasis added). Limiting its decision to that circumstance, see *id.* at 8a, the court of appeals concluded that Congress's decision to encourage federal commerce with Tribes as distinct domestic sovereigns is subject only to rational basis review under this Court's decision in *Mancari* and its progeny. This Court's cases make clear that such a distinction—which treats *Tribes* rather than individual Indians differently from other entities—is not based on race. It is instead based on the Tribes' distinct legal and political status as domestic sovereign nations subject to the protection of—and having a special constitutional and historical relationship with—the federal government. So "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward" the Tribes and their unique political status, "such legislative judgments will not be disturbed." 417 U.S. at 555.

Indeed, because this case concerns the federal government's economic interactions with the Tribes themselves, *i.e.*, trade between the United States and the Tribes as domestic quasi-sovereigns—it represents a straightforward case. The authority to treat commerce with the Tribes differently is recognized in the Constitution itself. As the court of appeals held and petitioners nowhere dispute, the Constitution grants Congress specific and plenary authority to regulate commerce with the Indian tribes through the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. See Pet. App. 11a. Treating Tribes differently is thus rational. That is particularly true where, as here, Congress is regulating the federal government's *own* commerce with the Tribes. *Ibid.* A congressional decision to direct federal purchases toward a favored

foreign nation (even one with citizens overwhelmingly of a single race) could not be challenged as racial (or national origin) discrimination. The same is true of Congress's decision to direct federal contracting toward domestic sovereign nations, such as the Indian tribes, to the States, or to other political entities or sovereigns.

2. Petitioners nonetheless argue that Section 8014(3) is a "racial" preference because, as Section 8014(3) existed in fiscal year 2000, it allowed the Defense Department to contract out governmental activities or functions (without performing a most efficient and cost effective organization analysis) when the contracting firm was under "Native American" ownership. Petitioners, however, do not dispute that Section 8014(3) has never been used to accord a preference to an entity owned by individual Native Americans—tribal or non-tribal—rather than to entities owned by federally recognized quasi-sovereign Indian tribes. Nor do petitioners dispute that, insofar as it is relevant here, Section 8014(3) in its current form can benefit only entities owned by the Tribes themselves. See p. 18 & note 7, *infra*. Nonetheless, petitioners characterize the decision below as upholding a purportedly "racial" preference because Section 8014(3) *could have* been (but was not) used to benefit firms owned by individual, non-tribal Indians as determined by race.

a. The argument is without merit. Contrary to petitioners' characterization, the court of appeals did not uphold "racial" preferences for individual, non-tribal Indians under Section 8014(3). Instead, it declined to consider that hypothetical application of Section 8014(3). A plaintiff "to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it *might* also be taken as applying to other persons *or other situations*

in which its application might be unconstitutional." Pet. App. 5a-6a (emphasis added) (quoting *United States* v. *Raines*, 362 U.S. 17, 21 (1960)); cf. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."). Here, Section 8014(3) has been invoked to award contracts only to entities owned by federally recognized Indian tribes. The only application of Section 8014(3) petitioners had standing to challenge involved a contract with such an entity.[5] And the statute, as it now exists, cannot be construed to apply to entities owned by individual Native Americans as opposed to those owned by federally recognized Tribes themselves. See p. 17 & note 7, *infra*. Petitioners have offered nothing "to suggest that there were any other 8014(3) contracts awarded in FY 2000, or that any contract went to the type of Native American firm they imagine, or that they were thereby adversely affected." Pet. App. 6a. As a result, the court of appeals correctly held that the "only question properly before" it was "whether the government violated the equal protection component of the Due Process Clause when it invoked § 8014(3) to grant a contract to a firm *wholly owned by Indian tribes*." *Id.* at 6a-7a (emphasis added); see *id.* at

---

[5] See Pet. App. 5a (petitioners "lack standing to pursue" the claim for relief "insofar as it relates to contracts other than the one at Kirtland," where the contract was awarded to an entity owned by a Tribe); *id.* at 6a ("The only relief they are possibly entitled to receive * * * is specific to Kirtland," where the contract was not awarded to an entity owned by "non-tribal Native American[s].").

8a ("only issue properly before" the court "is the validity of a preference for *Indian tribes*") (emphasis added).

Petitioners thus err in asserting that the court of appeals construed Section 8014(3) as "creating a racial preference," Pet. 6, or held that preferences for individual, non-tribal Indians are permissible, Pet. 7. The court of appeals did not so construe the statute. More important, the court of appeals expressly declined to address whether such preferences would be constitutional. This Court does not ordinarily grant review to "decide in the first instance issues not decided," let alone expressly avoided, "below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001). Yet it is an issue not addressed by the court of appeals—indeed, an abstract constitutional question concerning a hypothetical application of a now-superseded version of Section 8014(3)—on which petitioners seek review here.

b. The petition, moreover, fails to challenge the court of appeals' reasons for refusing to address the issue petitioners press before this Court, *i.e.*, the validity of preferences for entities owned by non-tribal Native Americans as identified by race. As noted above (p. 14 & note 5, *supra*), the court of appeals held that petitioners lack standing to challenge such "race-based" applications because petitioners failed to show that such preferences had ever been granted, were likely to be granted, or that petitioners had been or might conceivably be harmed thereby. The court of appeals also explained that prudential rules counsel against the issuance of potentially advisory opinions on such hypothetical circumstances. See Pet. App. 7a-8a

(declining to address "hypothetical applications [that] cannot be considered real" and "that may never arise").

Petitioners simply ignore those barriers. This Court does not ordinarily grant review in such circumstances. To the contrary, where the court of appeals identifies jurisdictional or other procedural barriers to an issue's resolution, and the petition raises that issue without addressing the barriers, the Court generally deems review inappropriate. See *Adarand*, 534 U.S. at 109-110 (dismissing petition as improvidently granted where "the petition for certiorari nowhere disputed the Court of Appeals' explicit holding that petitioner lacked standing to challenge the very provisions" that petitioner was asking the Court to review).

Thus, while petitioner is correct that governmental classifications based on race are subject to strict scrutiny under *Adarand*, that rule has no application to the issue addressed by the court of appeals—the validity of federal legislation granting preferential treatment to federally recognized *Indian tribes* as quasi-sovereign entities. Nor has petitioner offered any reason for disregarding the court of appeals' sensible decision to confine its opinion to the concrete controversy before it and to avoid adjudication of hypothetical applications of Section 8014(3) that have not arisen and do not appear likely to arise.

c. The petition does not present a question of ongoing significance because, after this suit was filed, Congress enacted new and superseding versions of Section 8014(3) that cannot be applied to benefit entities merely because they are owned by persons who are racially identified as Native Americans. In 2000, Congress amended Section 8014(3) to clarify its meaning by substituting the phrase "ownership *by an Indian tribe*, as defined in [25 U.S.C. 450b(e)], or a

Native Hawaiian organization, as defined in [15 U.S.C. 647(a)(15)]" for the less illuminating short-hand of "Native American ownership." Amendment No. 3319, 146 Cong. Rec. S4961 (daily ed. June 12, 2000), Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, § 8014, 114 Stat. 677 (2000) (emphasis added).[6]

In proposing that revision, moreover, the Senate sponsors of the original language in Section 8014(3) stated an intent to "further clarify that the exception for Native American-owned entities in section 8014 is based on a political classification, not a racial classification." 146 Cong. Rec. S5019 (daily ed. June 13, 2000) (colloquy between Sen. Stevens and Sen. Inouye). The sponsor specifically stated that:

> The Native American exception contained in section 8014 is intended to advance the Federal Government's interest in promoting self-sufficiency and the economic development of Native American communities. It does so not on the basis of race, but rather, based upon the unique political and legal status that the aboriginal, indigenous, native people of * * * America have had under our Constitution since the founding of this nation.

Ibid. (Sen. Stevens). Moreover, Senator Inouye, who was involved in drafting the original Section 8014(3),

---

[6] 25 U.S.C. 450b(e) (brackets in original) provides:

> "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

agreed that the amending language reflects that "the exception for Native American-owned entities" in the original version of Section 8014(3) was "based on a political classification, not a racial classification." *Ibid.*

Because implementation of Section 8014(3) in the future has (with one exception not relevant to this litigation) been limited to benefitting entities owned by federally recognized Tribes and tribal entities—furthering the cause of self-governance by encouraging tribal self-sufficiency through economic development—respondents are incorrect in asserting that the court of appeals' decision "shields a patently racial preference from strict scrutiny." Pet. 7.[7] They are incorrect first because the court of appeals did not address the validity of putatively "racial" preferences for firms owned by Indians as determined by race. See pp. 14-15, *supra*. They err second because the Fiscal Year 2000 version of Section 8014(3) was never interpreted or applied to provide for such preferences. See pp. 5-6, *supra*. And they err third because the current version of the statute specifically precludes such preferences. Petitioners, furthermore, raise no challenge to the current version of Section 8014(3) in this lawsuit. Instead, they confine their challenge to the now-superseded version of Section 8014(3) as it existed in the Department of Defense Appropriations Act for fiscal year 2000.

---

[7] The amended language includes, in addition to federally recognized Indian tribes, Native Hawaiian organizations (which do not have federal recognition like that of the Indian tribes, see p. 19 note 8, *infra*). Nothing in this litigation involves the legitimacy of federal classifications concerning Native Hawaiian organizations. Petitioners, moreover, have confined their challenge to Section 8104(3) in the fiscal year 2000 Appropriations Act, which did not mention Native Hawaiian organizations.

3. Notwithstanding the distinction between legislation that favors Indian tribes (*qua* political sovereigns) and legislation favoring individual Native Americans (as determined by race), petitioners appear to suggest that *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), undermines the validity of the tribal classifications upheld in *Mancari* and its progeny. But *Adarand* says nothing about Congress's authority to legislate with respect to Tribes—distinct domestic sovereign nations with a unique history and special constitutional status—or Congress's power to enact separate regulations concerning its own "Commerce * * * with the Indian Tribes," U.S. Const. Art. I, § 8, Cl. 3. It says nothing to undermine the longstanding distinction between "racial" classifications and political ones. And it has no bearing on the application of Section 8014(3) addressed by the court of appeals. That application does not favor individual Native Americans as determined by race (or even Tribal affiliation) but rather promotes federal commerce with entities owned by the Tribes themselves based on the Tribes' special political and constitutional quasi-sovereign status as domestic nations.[8]

---

[8] For similar reasons, *Rice* v. *Cayetano*, 528 U.S. 495 (2000), cited Pet. 12, is inapposite. That case concerned whether the Fifteenth Amendment permitted the State of Hawaii to restrict voting rights for certain state officials to Native Hawaiians and Hawaiians, categories that were defined by race or ancestry as a proxy for race. *Id.* at 499, 514-517. Holding that the Fifteenth Amendment precluded such classifications in voting, this Court declined to read *Mancari* as permitting States, "by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs." *Id.* at 522. This case obviously has nothing to do with voting or the Fifteenth Amendment; it has to do with the federal government's own commerce with the Indian tribes. Moreover, while the distinction at issue in *Rice* was racial,

Petitioners likewise err in arguing that the "courts of appeals have taken widely contrary approaches in addressing Indian preferences in light of *Adarand*." Pet. 12. Petitioners identify only one case—*Williams* v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997), cert. denied, 523 U.S. 1117 (1998)—that, according to petitioners, has departed from the longstanding approach illustrated by *Mancari*. But petitioners acknowledge that *Williams*' suggestion that *Mancari* might "shield[] only those statutes that affect uniquely Indian interests," *id.* at 665, was *dictum*, since *Williams* was decided on statutory grounds, *id.* at 666. *Williams*, moreover, concerned the preferential treatment of individual Native Americans through the exclusion of non-natives from the reindeer business. The decision thus had no reason to address, and did not resolve, the issue here—the federal government's own commerce with the Indian tribes as quasi-sovereign domestic nations. Finally, petitioners do not even argue that Section 8014(3) fails to advance "uniquely Indian interests" within the meaning of *Williams*. In particular, petitioners do not dispute that Section 8014(3) is a rational means of promoting tribal self-governance by encouraging tribal self-sufficiency through economic development. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987) ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their

---

the distinction here is between a particular set of political institutions—the Indian tribes—and all other entities. Finally, *Rice* dealt with preferential treatment of Native Hawaiians, rather than federally recognized Indian tribes as they have been recognized in other settings. *Id.* at 518-519.

members."). The *Williams* decision thus has no bearing on the proper resolution of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

R. ALEXANDER ACOSTA
Assistant Attorney General

MARK L. GROSS
SARAH E. HARRINGTON
Attorneys

NOVEMBER 2003